Instructions For Claims Under the Family and Medical Leave Act

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10.0 FMLA Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Family and Medical Leave Act, a Federal statute that prohibits an employer from interfering with or discriminating against an employee's exercise of the right granted in the Act to a period of unpaid leave [because of a serious health condition] [where necessary to care for a family member with a serious health condition] [because of the birth of a son or daughter] [because of the placement of a son or daughter with the employee for adoption or foster care].

Specifically, [plaintiff] claims that [describe plaintiff's claim of interference, discrimination, retaliation].

[Defendant] denies [describe defenses]. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues that you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., ("FMLA") was enacted to provide leave for workers whose personal or medical circumstances require that they take time off from work in excess of what their employers are willing or able to provide. *Victorelli v. Shadyside Hosp*., 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101). The Act is intended "to balance the demands of the workplace with the needs of families ... by establishing a minimum labor standard for leave" that lets employees "take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition." *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999) (quoting 29 U.S.C. § 2601(b)(1), (2)).

The FMLA guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a serious medical condition; a family member's serious illness; the arrival of a new son or daughter; or certain exigencies arising out of a family member's service in the armed forces. 29 U.S.C. § 2612(a)(1). During the 12 week leave period, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return,

the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1). The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of" these rights, § 2615(a)(1); to discriminate against those who exercise their rights under the Act, § 2615(a)(2); and to retaliate against those who file charges, give information, or testify in any inquiry related to an assertion of rights under the Act, § 2615(b). Violators are subject to payment of certain monetary damages and appropriate equitable relief, § 2617(a)(1). The Act provides for liquidated (double) damages where wages or benefits have been denied in violation of the Act, unless the defendant proves to the court that the violation was in good faith.

Special Provisions Concerning Servicemembers

The 2008 amendments to the FMLA added provisions concerning leave relating to service in the armed forces. *See* Pub. L. No. 110-181, Div. A, Title V, § 585, Jan. 28, 2008, 122 Stat. 129. The amendments added to Section 2612(a)'s list of leave entitlements leave "[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." 29 U.S.C. § 2612(a)(1)(E). The amendments also created an entitlement to servicemember family leave: "Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period." *Id.* § 2612(a)(3). And the amendments added a combined leave total where leave is taken under both subsection (a)(1) and subsection (a)(3): "During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period." *Id.* § 2612(a)(4).

These Instructions and Comments were drafted prior to the adoption of the 2008 amendments. The Committee has attempted to indicate places where the 2008 amendments provide a different framework for service-related leaves. When litigating cases involving service-related leaves practitioners should review with care the FMLA's provisions so as to note the special FMLA provisions relating to such leaves.

Employers Covered by the FMLA[1]

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R.

[1] Much of the following analysis of the FMLA is adapted from the Comment to the Eighth Circuit Jury Instructions on FMLA claims, Instruction 5.80.

§ 825.104(d). In addition, the Supreme Court has held that states are employers subject to the FMLA. *Nevada Dep' t of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under the FMLA. Before an employee can take leave under the Act, the following eligibility requirements must be met: he or she must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 504-06 (3d Cir. 2009) (discussing how to calculate the number of hours worked during the relevant period). A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited by the employer to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee 's son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the employee 's parent. 29 C.F.R. § 825.120(a)(3). 29 U.S.C. § 2612(f)(2) sets special provisions concerning servicemember family leaves taken by spouses employed by the same employer.

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. "Spouse" means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.122(a).

Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c). Persons with "in loco parentis" status under the FMLA include those who had day-to-day responsibility to care for and financially support the employee when the employee was a child. 29 C.F.R. § 825.122(c)(3). "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(c)(1). "Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Id. "Instrumental activities of daily living"include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. Id. "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. Id.

"Parent" means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term "parent" does

not include parents-in-law unless a parent-in-law meets the in loco parentis definition. 29 C.F.R. § 825.122(b).

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100. The right to take leave under the FMLA applies equally to male and female employees. A father as well as a mother can take family leave for the birth, placement for adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a).

For methods of determining the amount of leave, see 29 C.F.R. § 825.200.

What Constitutes a "Serious Health Condition?"

The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). For regulations defining the phrase "serious health condition," see 29 C.F.R. § 825.113.

The Third Circuit has held that conditions such as upset stomach or a minor ulcer could be "serious health conditions" if they meet the regulatory criteria. *See generally Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997) (jury question as to whether peptic ulcer was a serious medical condition, noting that the FMLA is "intended to protect those who are occasionally incapacitated by an on-going medical problem").

Certification of Medical Leave

The FMLA does not require an employee, in the first instance, to provide a medical certification justifying a leave for a serious health condition. But it does allow the employer to demand such a certification. The rules on certification were described by the court in *Shtab v. Greate Bay Hotel and Casino, Inc*., 173 F. Supp.2d 255, 264 (D.N.J. 2001):

> In order to safeguard the interests of employers and prevent abuses by employees, Congress included a provision in the FMLA which entitled employers to request medical certification from an employee requesting leave. 29 U.S.C. § 2613(a). When an employer requests medical certification, it must provide the employee with notice of the consequences of failing to provide the certification. 29 C.F.R. § 825.301(b)(1)(ii). A certification is considered sufficient if it contains: (1) the date on which the serious health condition began; (2) the probable duration of the condition; (3) the medical facts within the knowledge of the health care provider regarding the condition; and (4) if the leave is for the purpose of caring

for a family member, an estimate of the amount of time that the employee will be needed to care for the family member. 29 U.S.C. § 2613(b). "The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305(d); *Marrero v. Camden County Board of Social Services*, 164 F. Supp. 2d 455, 466 (D.N.J. 2001)("termination is not an appropriate response for an inadequate certification. Section 825.305(d) provides that where an employer finds a certification incomplete, it must give the employee a reasonable opportunity to cure any deficiencies").

The Act provides further protection for employers who doubt the veracity of an employee's leave request. The employer may require, at its own expense, that the employee obtain the opinion of a second health provider chosen or approved by the employer concerning any of the information, i.e., the date of commencement, the probable duration, or the medical facts, in the certification. 29 U.S.C. § 2613 (c); 29 C.F.R. § 825.307(a)(2). If the second opinion does not assuage the employer's suspicions, then the employer may require a third opinion which will be considered final. 29 U.S.C. § 2613 (d); 29 C.F.R. § 825.307(c). If the employee submits a complete certification signed by the health care provider, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, in order to clarify and authenticate the certification. 29 C.F.R. § 825.307 (a)(1). (some citations omitted).

Certification related to active duty or call to active duty

29 U.S.C. § 2613(f) provides: "An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer."

10.1.1 Elements of an FMLA Claim— Interference With Right to Take Leave

Model

[Plaintiff] claims that [defendant] interfered with [his/her] right to take unpaid leave from work under the Family and Medical Leave Act.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].[2]

Second: This condition was a "serious health condition," defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[3]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave. Simple verbal notice is sufficient.] The critical question for determining "appropriate notice"

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[2] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[3] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Defendant] interfered with the exercise of [plaintiff's] right to unpaid leave. Under the statute, "interference" can be found in a number of ways, including:

[Include any of the following factors raised by the evidence]

1) terminating employment;

2) refusing to allow an employee to return to his or her job, or to an equivalent position, upon return from leave;[4]

3) ordering an employee not to take leave or discouraging an employee from taking leave; and

4) failing to provide an employee who gives notice of the need for a leave a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

[However, interference cannot be found simply because [defendant] imposes reporting obligations for employees who are on leave. For example, an employer does not interfere with an employee's right to take leave by establishing a policy requiring all employees to call in to report their whereabouts while on leave. The Family and Medical Leave Act does not prevent employers from ensuring that employees who are on leave do not abuse their leave.]

I instruct you that you do not need to find that [defendant] intentionally interfered with [plaintiff's] right to unpaid leave. The question is not whether [defendant] acted with bad intent, but rather whether [plaintiff] was entitled to a leave and [defendant] interfered with the exercise of that leave.

[Affirmative Defense:

However, your verdict must be for [defendant] if [defendant] proves, by a preponderance of the evidence, that [plaintiff] would have lost [his/her] job even if [he/she] had not taken leave. For example, if [defendant] proves that [plaintiff]'s position was going to be eliminated even if [she/he] would not have been on leave, then you must find for [defendant]**].**

[4] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

Comment

29 U.S.C. § 2615(a)(1) provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." Claims brought under § 2615(a)(1) are denominated "interference" claims. The court in *Parker v. Hahnemann University Hospital,* 234 F. Supp.2d 478, 483 (D.N.J. 2002), provides helpful background on the gravamen of a claim brought under § 2615(a)(1), distinguishing it from a claim for discrimination brought under § 2615(a)(2):

> The first theory of recovery under the FMLA is the entitlement, or interference, theory. It is based on the prescriptive sections of the FMLA which create substantive rights for eligible employees. Eligible employees are entitled to up to twelve weeks of unpaid leave per year because of a serious health condition, a need to care for a close family member with a serious health condition, or a birth, adoption, or placement in foster care of a child. An employee is also entitled to intermittent leave when medically necessary, 29 U.S.C. § 2612(b), and to return after a qualified absence to the same position or to an equivalent position, 29 U.S.C. § 2614(a)(1). . . .
>
> An employee can allege that an employer has violated the FMLA because she was denied the entitlements due her under the Act. 29 U.S.C. § 2615(a)(1). In such a case, the employee only needs to show she was entitled to benefits under the FMLA and that she was denied them. She does not need to show that the employer treated other employees more or less favorably and the employer cannot justify its action by showing that it did not intend it or it had a legitimate business reason for it. The action is not about discrimination; it is about whether the employer provided its employees the entitlements guaranteed by the FMLA.

See also Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of discrimination is required for an interference, as that claim is made if the employee shows "that he was entitled to benefits under the FMLA and that he was denied them.").

Because the issue in interference claims is not discrimination but interference with an entitlement, courts have found that the plaintiff is not required to prove intentional misconduct. *See, e.g., Williams v. Shenango, Inc.,* 986 F. Supp. 309, 317 (W.D.Pa. 1997) (finding that "a claim under § 2615(a)(1) is governed by a strict liability standard"); *Moorer v. Baptist Memorial Health Care*, 398 F.3d 469, 487 (6th Cir. 2005) ("Because the issue [in an interference claim] is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer."); *Diaz v. Fort Wayne Foundry Corp.,* 131 F.3d 711, 712 (7th Cir. 1997) (noting that an employee alleging interference with an FMLA entitlement is not alleging discrimination and therefore no intent to discriminate need be found).

Affirmative Defense Where Employee Would Have Lost the Job Even if Leave Had Not Been Taken

After taking a qualified leave, the employee is generally entitled to reinstatement in the same or a substantially equivalent job. However, this is not the case if the employee would have lost her

job even if she had not taken leave. As the court put it in *Parker*, supra, "the FMLA does not give the employee on protected leave a bumping right over employees not on leave."

The *Parker* court considered which party had the burden of proof on whether the employee would have lost her job even if she had not taken leave. The court noted that Department of Labor regulations interpreting the FMLA place the burden of proof on the employer. 29 C.F.R. § 825.216(a)(1). The court continued its analysis as follows:

> The Third Circuit has not considered whether this regulation places the burden on the employer. The Tenth Circuit has held that it does and functions like an affirmative defense. *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002). Under their approach, the plaintiff presents her FMLA case by showing, as explained above, that she was entitled to benefits and denied them. Id. Then, the burden is on the employer to mitigate its liability by proving that she would have lost her job whether or not she took leave. Id. The Seventh Circuit instead found that the regulation leaves the burden on the plaintiff to prove that she was entitled to benefits and denied them even though the defendant presented some evidence indicating that her job would have been terminated if she had not taken leave. *Rice v. Sunrise Express,* 209 F.3d 1008, 1018 (7th Cir.2000). . . It interprets the regulation as only requiring the defendant to come forward with some evidence that the termination would have occurred without the leave.
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> This Court finds that the better approach is the one followed by the Tenth Circuit which places the burden on the employer. An issue about the burden of proof is a "question of policy and fairness based on experience in the different situations," *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973), and policy, fairness, and experience support the Tenth Circuit's approach. As for policy, the approach upholds the validity and the plain language of the regulation that was promulgated in accordance with standard administrative procedure. As for fairness, the approach places the burden on the party who holds the evidence that is essential to the inquiry, evidence about future plans for a position, discussions at management meetings, and events at the workplace during the employee's FMLA leave. *See Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977) (stating that burdens of proof should "conform with a party's superior access to the proof"). As for experience, other labor statutes also place the burden on the employer to mitigate its liability to pay an employment benefit in certain situations. As a result, this Court will require plaintiff to bear the burden of proving that she was entitled to reinstatement and was denied it, and will require defendants to mitigate their liability by bearing the burden of proving plaintiff's position would have been eliminated even if she had not taken FMLA leave.

234 F. Supp.2d at 487 (footnotes and some citations omitted). Accordingly, the instruction places the burden of proof on the defendant to show that the plaintiff would have lost her job even if she had not taken leave. *See also Throneberry v. McGehee Desha County Hosp.,* 403 F.3d 972 (8th Cir. 2005) (employer has the burden of showing that employee would have been discharged even if she had not taken FMLA leave).

The Meaning of "Interference"

"[F]iring an employee for [making] a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee." *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009).

Courts have held that conduct discouraging employees from taking FMLA leave constitutes interference, even if the employee ends up taking the leave. For example, in *Shtab v. The Greate Bay Hotel and Casino,* 173 F. Supp.2d 255 (D.N.J. 2001), the court found that an employee could establish an interference claim by proving that when he brought up the subject of FMLA leave, the employer tried to persuade him to delay the leave because it was an especially busy period. The plaintiff did not delay the leave, and the defendant argued that there was no ground of recovery for interference because the plaintiff suffered no adverse employment action. But the court disagreed, relying on 29 C.F.R. § 825.220 (b), which defines "interference" as including "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." *See also Williams v. Shenango, Inc.,* 986 F. Supp. 309, 320-21 (W.D. Pa. 1997) (employer's motion for summary judgment denied where "reasonable persons could conclude that the initial denial of leave and the suggestion of rescheduling leave may, in fact, constitute 'interference with' FMLA rights").

The FMLA does not, however, prohibit reasonable attempts by the employer to protect against abuses in taking leave. Thus, in *Callison v. City of Philadelphia,* 430 F.3d 117, 121 (3d Cir. 2005), the employer imposed a requirement on all employees taking sick leave that they "notify the appropriate authority or designee when leaving home and upon return" during working hours. The plaintiff argued that the call-in requirement constituted interference with his FMLA leave, which he interpreted as a right to be "left alone." But the court disagreed, stating that the FMLA does not prevent employers "from ensuring that employees who are on leave from work do not abuse their leave." Bracketed material in the instruction is consistent with the *Callison* decision.

_____Employers are permitted to consider an employee's FMLA absence when allocating performance bonuses. Thus, in *Sommer v. Vanguard Group,* 461 F.3d 397, 401 (3d Cir. 2006), the court held that the employer was not liable for interference under the FMLA when it refused to award the plaintiff a full annual bonus payment under its Partnership Plan, but instead awarded him a payment prorated on the basis of the time he was absent on FMLA leave. Parsing the FMLA regulations, the Court differentiated between a bonus program based upon "production," and a bonus plan dependent upon the absence of an occurrence–such as a bonus for no absences or no injuries. The FMLA permits employers to consider an FMLA absence in assessing productivity; it does not, however, allow an employer to deny benefits that are based on an absence of an occurrence. The *Sommer* Court found that the employer's partnership plan was a performance plan, because awards were contingent on performance of a certain number of hours per year.

Notice Requirements

Both the employee and the employer have notice obligations under the FMLA. These notice obligations are described by the court in *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 527 (D.N.J. 2000):

> The FMLA and its regulations impose corresponding notice requirements on both the employer and employee. The regulations require that covered employers post in conspicuous places on its premises a notice explaining the FMLA's provisions and the procedures for filing complaints of FMLA violations. 29 C.F.R. § 825.300(a). An employer who fails to comply with the posting requirement is estopped from denying an employee FMLA leave based on the employee's failure to supply advance notice of his need for leave. 29 C.F.R. § 825.300(b). The regulations further authorize a civil money penalty limited to $ 100 for each offense against an employer that willfully violates the posting requirement. 29 C.F.R. § 825.300(b).
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> In addition to the posting requirement, employers must include in all employment handbooks or manuals information concerning employee entitlements and obligations under the FMLA. 29 C.F.R. § 825.301(a)(1). Additionally, once an employee provides notice of a need for FMLA leave, the employer has a duty to provide that employee with "written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." 29 C.F.R. § 825.301(b)(1).
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> With regard to the notice obligations of employees, such obligations depend on whether the employee's need for leave is foreseeable or unforeseeable. When the necessity for leave is foreseeable based on planned medical treatment, the Act requires that the employee:
>
> > (A) . . . make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or [the employee's] [child], spouse, or parent . . ., as appropriate; and
> >
> > (B) . . . provide the employer with [at least] 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.
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> 29 U.S.C. § 2612(e)(2). Where it is not possible for an employee to give thirty days notice, the regulations define "as soon as practicable" as requiring "at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." 29 C.F.R. § 825.302(b).
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> Although the Act is silent as to an employee's notice requirements for unforeseeable leave, the regulations address this issue, providing:

> (a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.
>
> (b) The employee should provide notice to the employer either in person or by telephone . . . . The employee need not expressly assert rights under the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional information through informal means. The employee . . . will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

The *Zawadowicz* Court concluded that the sufficiency of notice is generally a jury question.

As to the employee's notice requirement, the Third Circuit emphasized in *Sarnowski v. Air Brooke Limousine, Inc.,* 510 F.3d 398, 402 (3d Cir. 2007), that it is to be flexibly applied. The court observed that the notice need not be in writing, and that "employees may provide FMLA qualifying notice before knowing the exact dates or duration of the leave they will take." The *Sarnowski* court concluded that the critical question for the employee's attempt to notify is "whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." The Instruction contains language that is consistent with the *Sarnowki* court's liberal interpretation of the FMLA notice requirement.

The 2008 amendments added a special provision concerning notice for leave due to active duty of a family member. *See* 29 U.S.C. § 2612(e)(3).

Consequences of Employer's Failure to Comply With the Notice Requirement

In *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 90 (2002), the Court invalidated a regulation promulgated by the Department of Labor which had provided that if the employer does not give proper notice, the employee's leave could not be counted against the 12-week FMLA period. In that case, the employee took a 30 week leave, and the employer had not given proper notice that the leave would count against her FMLA entitlement. Under the terms of the regulation, this meant that the employee would be entitled to 12 more weeks of leave after the 30 already taken. The Court held that the regulation was beyond the Secretary of Labor's authority, because it was not sufficiently tied to the interests protected by the FMLA:

> The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice. ... [The regulation] transformed the company's failure to give notice -- along with its refusal to grant her more than 30 weeks of leave -- into an actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to reinstatement and backpay, even though reinstatement could not be said to be "appropriate" in these circumstances and Ragsdale lost no compensation "by reason of" Wolverine's failure to designate her absence as FMLA leave. By mandating these results absent a showing of consequential harm, the regulation worked an end run around important limitations of the statute's remedial scheme.

The Third Circuit has emphasized that the Supreme Court, while invalidating the regulation at issue in *Ragsdale*, did not question the validity of the regulations setting out the FMLA notice requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004). The *Conoshenti* court noted that the regulations require "employers to provide employees with individualized notice of their FMLA rights and obligations" by designating leave as FMLA-qualifying, and giving notice of the designation to the employee. Moreover, each time the employee requests leave, the employer must, within a reasonable time "provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." (Quoting 29 C.F.R. § 825.301(b)(1), (c)). The plaintiff in *Conoshenti* alleged that the employer's failure to give proper notice under the regulations interfered with his ability to exercise his right to an FMLA leave. Specifically, had he received the proper notice, he would have been able to make an informed decision about structuring his leave and would have structured it, and his plan of recovery, in such a way as to preserve the job protection afforded by the FMLA. The Third Circuit concluded that "this is a viable theory of recovery," and in doing so addressed the defendant's argument that any reliance on the notice provisions in the regulations was prohibited by *Ragsdale*. The court stated that the *Ragsdale* Court "expressly noted that the validity of notice requirements of the regulations themselves was not before it. Accordingly, *Ragsdale* is not dispositive of anything before us."

However, *Ragsdale* did support the court of appeals' more recent conclusion that a prior version of 29 C.F.R. § 825.110(d) – which provided, at the relevant time, that "[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible" – was invalid. *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 507 (3d Cir. 2009) (explaining that this holding was "consistent with the recent amendment to § 825.110, which removed the remedial eligibility provision in light of [*Ragsdale*'s] pronouncement that a remedial eligibility provision in 29 C.F.R. § 825.700 was invalid for similar reasons").

10.1.2 Elements of an FMLA Claim — Discrimination — Mixed-Motive

[Plaintiff] claims that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] taking leave was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: Plaintiff [or a family member as defined by the Act] had a [specify condition].[5]

Second: This condition was a "serious health condition," defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[6]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave. Simple verbal notice is sufficient.] The critical question for determining "appropriate notice"

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[5] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[6] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not placed in a substantially equivalent position upon [his/her] return from leave][7] [was terminated after returning from leave] [was demoted after returning from leave].

Fifth: [Plaintiff's] taking leave was a motivating factor in [defendant's] decision [not to reinstate, to terminate, etc.] [plaintiff].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights.

In showing that [plaintiff's] taking leave was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that the leave was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] taking leave played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

[For use where defendant sets forth a "same decision" affirmative defense:

If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove, you must then decide whether [defendant] has shown that [defendant] would have made the same decision with respect to [plaintiff's] employment even if there had been no motive to discriminate on the basis of [plaintiff's] having taken leave. Your verdict must be for [defendant] if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] leave had played no role in the employment decision.**]**

Comment

The nature of claims under 29 U.S.C. § 2615(a)(2)

29 U.S.C. § 2615(a)(2) provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]." Discrimination claims brought under subsection (a)(2) are also called "retaliation" claims, though they differ from the kind of retaliation claims ordinarily brought under the statutes covering employment discrimination. Claims brought under subsection (a)(2) allege "retaliation" for

[7] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

the exercise of the right to take unpaid leave under the FMLA. This is distinct from claims of retaliation for actions such as complaining about discrimination, testifying in discrimination proceedings, and the like, which are comparable to the retaliation claims brought under other statutes, such as Title VII. In the Family and Medical Leave Act, those more "traditional" retaliation claims are covered by 29 U.S.C. § 2615(b), which provides that it is unlawful to discriminate against a person who has, e.g., "instituted or caused to be instituted any proceeding, . . . has given, or is about to give, any information in connection with any inquiry or proceeding, . . . or has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under" the FMLA. A separate instruction for these forms of retaliation, analogous to retaliation claims brought under other employment discrimination statutes, is found at 10.1.4.

The court in *Bearley v. Friendly Ice Cream Corp.,* 322 F. Supp.2d 563, 571 (M.D.Pa. 2004), describes the distinction between interference and discrimination/retaliation claims under the FMLA, and the legal standards applicable to the latter claims, as follows:

> Courts have recognized two distinct causes of action under the Family and Medical Leave Act (hereinafter FMLA). First, a plaintiff may pursue recovery under an "interference" theory. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny" an employee's rights under the FMLA. Under an interference claim, it is plaintiff's burden to demonstrate that she was entitled to a benefit under the FMLA, but was denied that entitlement. *Parker v. Hahnemann Univ. Hosp.,* 234 F. Supp. 2d 478, 485 (D. N.J. 2002). The FMLA entitles eligible employees to reinstatement at the end of their FMLA leave to the position held before taking leave or an equivalent position. If the plaintiff meets this burden, then it is defendant's burden to demonstrate that she would have been denied reinstatement even if she had not taken FMLA leave.
>
> The second type of recovery under the FMLA is the "retaliation" theory. This claim arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to discriminate against an employee who has taken FMLA leave. Retaliation claims are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792. To establish a prima facie case of retaliation under the FMLA, a plaintiff must show: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the adverse action and Plaintiff's exercise of her FMLA rights. After establishing a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to plaintiff to establish that the employer's reasons are pretextual. (Most citations omitted).

See also Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005) (noting the distinction between "interference" claims brought under subdivision (a)(1) and "discrimination or retaliation claims" under subdivision (a)(2)); *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009) (noting that "it is not clear whether firing an employee for requesting FMLA leave should be classified as interference with the employee's FMLA rights, retaliation against the employee for

exercising those rights, or both," and concluding that "firing an employee for [making] a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee").

Availability of a mixed-motive framework for FMLA claims

Discrimination/retaliation claims are subject to the basic mixed-motive/pretext delineation applied to employment discrimination claims brought under Title VII. *See generally Wilson v. Lemington Home for the Aged*, 159 F. Supp.2d 186, 195 (W.D.Pa. 2001) ("In analyzing claims made for retaliation under the FMLA, courts look to the legal framework established for Title VII claims. . . . Thus, a plaintiff may prove FMLA retaliation by direct evidence as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-46 (1989), or indirectly through the burden shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)."); *Baltuskonis v. U.S. Airways, Inc*., 60 F. Supp. 2d 445, 448 (E.D. Pa. 1999) (same).

The distinction between "mixed-motive" cases and "pretext" cases is generally determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant's activity was motivated at least in part by discriminatory animus, and therefore this "mixed-motive" instruction should be given. If the evidence of discrimination is only circumstantial, then defendant can argue that there was no discriminatory animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 10.1.3 should be given. *See generally Conoshenti v. Public Service Electric & Gas Co.,* 364 F.3d 135, 147 (3d Cir. 2004) (applying the *Price Waterhouse* framework in an FMLA discrimination case in which direct evidence of discrimination was presented).

The court in *Miller v. Cigna Corp*., 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, distinguished "mixed motive" instructions from "pretext" case instructions as follows:

> Only in a "mixed motives" . . . case is the plaintiff entitled to an instruction that he or she need only show that the forbidden motive played a role, i.e., was a "motivating factor." Even then, the instruction must be followed by an explanation that the defendant may escape liability by showing that the challenged action would have been taken in the absence of the forbidden motive. . . . In all other . . . disparate treatment cases, the jury should be instructed that the plaintiff may meet his or her burden only by showing that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process.

See also Starceski v. Westinghouse Electric Corp., 54 F.3d 1089, 1096, n4 (3d Cir. 1995) (ADEA case):

> An employment discrimination case may be advanced on either a pretext or "mixed-motives" theory. In a pretext case, once the employee has made a prima facie showing of

> discrimination, the burden of going forward shifts to the employer who must articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If the employer does produce evidence showing a legitimate, nondiscriminatory reason for the discharge, the burden of production shifts back to the employee who must show that the employer's proffered explanation is incredible. At all times the burden of proof or risk of non-persuasion, including the burden of proving "but for" causation or causation in fact, remains on the employee. In a "mixed-motives" or *Price Waterhouse* case, the employee must produce direct evidence of discrimination, i.e., more direct evidence than is required for the *McDonnell Douglas/Burdine* prima facie case. If the employee does produce direct evidence of discriminatory animus, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision. In short, direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of "but for" cause or cause in fact. (Citations omitted).

To the extent that *Miller* and *Starceski* held that a mixed-motive framework is available in ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. It is not clear what effect, if any, *Gross* will have on existing Third Circuit precedents recognizing a mixed-motive FMLA theory.

"Same Decision" Affirmative Defense

Section 107 of the Civil Rights Act of 1991 (42 U.S.C. §2000e-(5)(g)(2)(B)) changed the law on "mixed-motive" liability in Title VII actions. Previously, a defendant could escape liability by proving the "same decision" would have been made even without a discriminatory motive. The Civil Rights Act of 1991 provides that a "same decision" defense precludes an award for money damages, but not liability.

There is no indication in the FMLA of an intent to incorporate the "same decision" revision of the Civil Rights Act of 1991. The 1991 amendments apply specifically to actions brought under Title VII, and Title VII does not prohibit discrimination for taking unpaid leave. Accordingly, the pattern instruction sets forth the "same decision" defense as one that precludes liability, and thus differentiates it from the "same decision" defense in Title VII mixed-motive actions. See Comment to Eighth Circuit Pattern Jury Instruction 5.82 ("A defendant may avoid liability in an FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave.").

Notice Requirements

For a discussion of notice requirements pertinent to FMLA claims, see the commentary to Instruction 10.1.1.

Serious Health Condition

For a discussion of the term "serious health condition" see the commentary to Instruction 10.0.

Animus of Employee Who Was Not the Ultimate Decisionmaker

For a discussion of the Court's treatment in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), of the animus of an employee who was not the ultimate decisionmaker, see Comment 5.1.7. *Staub* concerned a statute that used the term "motivating factor," and it is unclear whether the ruling in *Staub* would extend to mixed-motive claims under statutes (such as the FMLA) that do not contain the same explicit statutory reference to discrimination as a "motivating factor."

10.1.3 Elements of an FMLA Claim— Discrimination —Pretext

Model

In this case [plaintiff] is alleging that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] exercise of the right to take leave was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].[8]

Second: This condition was a "serious health condition", defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[9]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave.

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[8] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[9] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

Simple verbal notice is sufficient.] The critical question for determining "appropriate notice" is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not placed in a substantially equivalent position upon [his/her] return from leave][10] [was terminated after returning from leave] [was demoted after returning from leave].

Fifth: [Plaintiff's] taking leave was a determinative factor in [defendant's] decision to [describe adverse employment action].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave under the Family Medical Leave Act was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] taking leave, the [adverse employment action] would not have occurred.

Comment

[10] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

This instruction is to be used when the plaintiff's proof of discrimination is circumstantial rather than direct. In *Miller v. Cigna Corp.,* 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, the court discussed the proper instruction to be given in a circumstantial evidence/pretext case:

> A plaintiff . . . who does not qualify for a burden shifting instruction under *Price Waterhouse* [i.e., a "mixed-motive" case] has the burden of persuading the trier of fact by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process. (Quoting *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611 (1993)).

(To the extent that *Miller* contemplated the use of the *Price Waterhouse* framework for ADEA claims, it has been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). For a discussion of mixed-motive claims under the FMLA, see Comment 10.1.2.)

The Court in *Miller* reversed a verdict for the defendant because the trial judge instructed the jury that age must be the "sole cause" of the employer's decision. That standard was too stringent; instead, in a pretext case, "plaintiff must prove by a preponderance of the evidence that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." *See Alifano v. Merck & Co., Inc*., 175 F. Supp.2d 792, 794 (E.D.Pa. 2001) (applying the *McDonnell-Douglas* analysis to an FMLA claim).

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). If the defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for discrimination, or in some other way prove it more likely than not that discrimination motivated the employer. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipolini v. Spencer Gifts, Inc.,* 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) ("The burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision."). The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The employer's proffered reason can be shown to be pretextual by circumstantial as well as direct evidence. *Chipolini v. Spencer Gifts, Inc.,* 814 F.2d 893 (3d Cir. 1987) (en banc). "To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Keller v. Orix Credit Alliance, Inc.,* 130 F.3d 1101, 1109 (3d Cir. 1997).

Notice Requirements

For a discussion of notice requirements under the FMLA, see the commentary to Instruction 10.1.1.

Serious Health Condition

For a discussion of the term "serious health condition" see the commentary to Instruction 10.0.

10.1.4 Elements of an FMLA Claim — Retaliation for Opposing Actions in Violation of FMLA

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because [plaintiff] opposed a practice made unlawful by the Family and Medical Leave Act.

In order to prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer[11]] [testified/agreed to testify in a proceeding] asserting rights under the Family and Medical Leave Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Family and Medical Leave Act claim, but only that [he/she] was acting under a good faith belief that [his/her] [or someone else's] rights under the Family and Medical Leave Act were violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proved by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

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[11] See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

Comment

The FMLA establishes a cause of action for retaliation that is similar to those provided in other employment discrimination statutes. 29 U.S.C. § 2615(b) provides as follows:

> (b) *Interference with proceedings or inquiries.* It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--
>
> has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to [the FMLA.];
>
> has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA]; or
>
> has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].

Subsection (b) provides a cause of action that is separate from 29 U.S.C. § 2615 (a)(2), which is also referred to as a "retaliation" claim, but is different because it seeks recovery for the plaintiff's having exercised the right to unpaid leave. In contrast, the more traditional retaliation claim of subsection (b) is designed to protect those who complain about conduct that is illegal under the FMLA,[12] or who participate in proceedings seeking recovery for illegal activity under the Act. Potentially subsection (b) could protect a person who is not entitled to or never exercised the right to leave, but who complained about or participated in a proceeding to remedy the violation of the FMLA rights of another person. That is not the case with claims under subsection (a)(2), where recovery is limited to those who actually took or tried to take unpaid leave. See Instructions 10.1.2 and 10.1.3 for claims brought under 29 U.S.C. § 2615(a)(2).

The sparse case law under 29 U.S.C. § 2615(b) indicates that it is to be applied in the same way that other employment discrimination statutes treat retaliation claims. *See, e.g, Buie v. Quad/Graphics,* 366 F.3d 496, 503 (7th Cir. 2004) *(*"We evaluate a claim of FMLA retaliation the same way that we would evaluate a claim of retaliation under other employment statutes, such as the ADA or Title VII.").

Protected Activity

The literal terms of 29 U.S.C. § 2615(b) would appear to limit protected conduct to that

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[12] *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), construed the Fair Labor Standards Act's anti-retaliation provision and held that "the statutory term 'filed any complaint' includes oral as well as written complaints within its scope." *Id.* at 1329. The Court did not state whether this holding has implications for the interpretation of the phrase "filed any charge" in the FMLA's anti-retaliation provision.

involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as Title VII and the ADEA) which protect informal activity in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

The Third Circuit has not yet decided whether there is a cause of action for retaliation under 29 U.S.C. § 2615(b) when an employee has informally opposed an employer's action on the ground that it violates the FMLA. But case law construing similar language in the retaliation provision of the Equal Pay Act indicates that such a provision should be construed broadly so that informal complaints constitute protected activity. See the commentary to Instruction 11.1.2. This instruction therefore includes informal complaints as protected activity. See *Sabbrese v. Lowe's Home Centers, Inc*., 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (finding a valid retaliation claim when the plaintiff was discharged after informally complaining to the employer about being disciplined for taking leave).

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
>
> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct.

2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.
>
> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

126 S.Ct. at 2415 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the FMLA provision on retaliation, supra. This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.[13]

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*

[13] The Committee has not attempted to determine whether *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) – in which the Supreme Court recognized a right of action under Title VII for certain third parties who engaged in no protected activity but were subjected to reprisals based on the protected activities of another employee – provides authority for recognition of similar third-party retaliation claims under the FMLA. For a discussion of *Thompson*, see Comment 5.1.7.

discrimination by an employer in response to protected activity.

Because the FMLA anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it prohibits not only "discharge" but broadly prohibits "any other discrimination" — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her").

It should be noted, however, that damages for emotional distress and pain and suffering are not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys*., 994 F. Supp. 288, 291 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is probably less likely to be compensable under the FMLA than it is under Title VII. For further discussion of *White*, see the Comment to Instruction 5.1.7.

Determinative Effect

Instruction 10.1.4 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. A distinction between pretext and mixed-motive cases has on occasion been recognized as relevant for both Title VII retaliation claims and FMLA claims. For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a case that proceeded on a "pretext" theory, not to use the "determinative effect" language). Comment 5.1.7 discusses the possibility of applying a mixed-motive framework to Title VII retaliation claims.

It is unclear whether a mixed-motive framework can appropriately apply to FMLA retaliation claims under Section 2615(b). In the context of another statutory scheme the Supreme Court has criticized the use of a "mixed motive" framework for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e- 5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

Timing

On the relationship between timing and retaliation in FMLA cases, *see, e.g., Sabbrese v. Lowe's Home Centers, Inc*., 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) ("The court finds that plaintiff

met the causal link requirement of his prima facie case by presenting evidence that: (1) he was terminated two weeks after he complained to store management; (2) defendant's management officials gave inconsistent explanations about who authorized his firing; and (3) plaintiff was permitted to continue working after allegedly committing a violation so severe that he could have been immediately terminated.").

10.2.1 FMLA Definitions — Serious Health Condition

Model

The phrase "serious health condition," as used in these instructions, means an illness, injury, impairment, or physical or mental condition that involves:

Set forth any of the following that are presented by the evidence:

[Inpatient care. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities) due to the inpatient care, or any later treatment in connection with the inpatient care];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, and any later treatment or period of incapacity relating to the same condition, that also involves:

[Insert here the relevant requirement. See Comment for a discussion of the requirements for showing incapacity plus treatment.]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic serious health condition. [See Comment for a discussion of the requirements for showing a chronic serious health condition.]];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective. [[The employee or family member] must be under the continuing supervision of a health care provider, even though [the employee or family member] may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or

on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.]

Comment

This instruction can be used if the court wishes to provide the jury with more detailed information on what constitutes a serious health condition than that set forth in Instructions 10.1.1-10.1.3. The definition of "serious health condition" is currently provided by 29 C.F.R. § 825.113. Although the Committee will endeavor to update this Comment to reflect subsequent changes in the regulations, readers should keep in mind the need to check for any such changes.

The regulations' definition of "serious health condition" is complicated. It should not be necessary to charge the jury on the all the intricacies of the regulation, because counsel should be able to reach agreement concerning which details are in dispute. Accordingly, some portions of Instruction 10.2.1 simply refer to the relevant portions of the regulation, which are set forth in this Comment.

Incapacity plus treatment

29 C.F.R. § 825.115 provides in part:

> A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
>
> (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
>
> (3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term "extenuating circumstances" in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

In a case that was controlled by a prior version of the regulations, the Court of Appeals held that "an employee may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony." *Schaar v. Lehigh Valley Health Services, Inc.*, 598 F.3d 156, 161 (3d Cir. 2010). The Committee has not attempted to determine whether the *Schaar* holding applies with equal force to cases controlled by the current version of the regulations.

Chronic serious health condition

29 C.F.R. § 825.115 provides in part:

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

...

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

Further provision applicable to pregnancy, prenatal care, and chronic serious health conditions

29 C.F.R. § 825.115(f) provides: "Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the

employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness."

Other relevant provisions in 29 C.F.R. § 825.113

29 C.F.R. § 825.113(c) defines "treatment." 29 C.F.R. § 825.113(d) excludes certain conditions from the definition of "serious health condition."

Health care provider

The definitions section of the FMLA (29 U.S.C. §2611(6)) defines "health care provider" as follows:

> 6) *Health care provider.* The term "health care provider" means--
>
> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary to be capable of providing health care services.

The relevant regulations concerning persons determined to be capable of providing health care services can be found at 29 C.F.R. § 825.125.

For case law in the Third Circuit construing the term "serious health condition", *see, e.g., Victorelli v. Shadyside Hospital,* 128 F.3d 184, 190 (3d Cir. 1997)("A factfinder may be able reasonably to find that Victorelli suffers from something more severe than a 'minor ulcer' and as such is entitled to FMLA protection."); *Marrero v. Camden County Board of Social Services*, 164 F. Supp.2d 455, 465 (D.N.J. 2001) (concluding that "there is nothing in the statute or regulations that prevents plaintiff's anxiety and depression from qualifying as a serious condition under the Act. Indeed, the regulations expressly recognize the seriousness of mental illness under certain circumstances.").

10.2.2 FMLA Definitions — Equivalent Position

Model

[Defendant] claims that after returning from leave, [plaintiff] was placed in a position that was equivalent to the one that [he/she] had before taking leave. [Plaintiff] claims that the new position was not equivalent to the old one. Under the Family and Medical Leave Act, the new position is equivalent to the old one if it is virtually identical in terms of pay, benefits and working conditions, including privileges, "perks" and status. It must involve the same or substantially similar duties and responsibilities, and require substantially equivalent skill, effort, responsibility, and authority. [Plaintiff] must prove by a preponderance of the evidence that the new position was not equivalent to the old one.

Comment

The court may wish to use this instruction if there is a dispute on whether the plaintiff was restored to an equivalent position. The instruction tracks the language of the FMLA regulations at 29 C.F.R. § 825.215(a). *See also* 29 C.F.R. §§ 825.215(b) - (f) (providing further detail on the subject). For an application of the "equivalent position" test, *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 781 (M.D. La. 2004), where the plaintiff, who was employed as the executive in charge of housekeeping at a hotel, was offered the position of executive in charge of food and beverages upon return from FMLA leave. The court noted that courts have interpreted the "equivalent position" standard narrowly; but it concluded that these two positions were equivalent because the salary and benefits were the same, and both positions "involved supervisory duties and both had the same goal and responsibility -- customer service in and maintenance of the Baton Rouge Marriott in a managerial capacity."

10.3.1 FMLA Defense — Key Employee

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that [he/she] was not restored to [his/her] position [or to an equivalent position] after returning from a leave authorized by the Family and Medical Leave Act, you must then consider [defendant's] defense. The Family and Medical Leave Act permits an employer to deny job restoration to a "key employee" when necessary to protect the employer from substantial and grievous economic injury. [Defendant] contends that it had no obligation to restore [plaintiff] to a position because [plaintiff] was a "key employee" and that [describe defendant's action] was necessary to protect [defendant] from substantial and grievous economic injury.

Your verdict must be for [defendant] if [defendant] proves all of the following by a preponderance of the evidence:

First: That [plaintiff] was a "key employee." [Plaintiff] was a "key employee" within the meaning of the Act if [he/she] was a salaried employee who was among the highest paid 10 percent of all the employees employed by [defendant] within 75 miles of [plaintiff's] worksite. The determination of whether [plaintiff] was among the highest paid 10 percent is to be made as of the time [plaintiff] gave notice of the need for leave.

Second: That failing to restore [plaintiff] to [his/her] former job [or an equivalent position] was necessary to prevent substantial and grievous economic injury to the operations of [defendant]. In determining whether or not [defendant's] action was economically justified in this sense, you may consider factors such as whether [plaintiff] was so important to the business that [defendant] could not temporarily do without [plaintiff] and could not replace [plaintiff] on a temporary basis. You may also consider whether the cost of reinstating [plaintiff] after a leave would be substantial.

Third: That [defendant], when it determined that substantial and grievous injury would occur from [plaintiff's] leave, promptly notified [plaintiff] of its intent to deny restoration of [plaintiff's] job, specifying in the notice [defendant's] contention that [plaintiff] was a "key employee" and restoration of [his/her] job after a leave would cause substantial and grievous economic injury to [defendant].

Comment

An employer may deny job restoration to a "key employee" if the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 U.S.C. §

2614(b) provides as follows:

> (b) *Exemption concerning certain highly compensated employees.*
> (1) *Denial of restoration.* An employer may deny restoration . . . if--
> (A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
> (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and
> (C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.
> (2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

For a general discussion of "key employees," see 29 C.F.R. § 825.217. The phrase "substantial and grievous economic injury" covers actions that threaten the economic viability of the employer or lesser injuries that cause substantial long-term economic injury. But minor inconveniences and costs that the employer would experience in the normal course of doing business do not constitute "substantial and grievous economic injury." 29 C.F.R. § 825.218(c).

For a case applying the term "key employee," *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 783 (M.D. La. 2004), where the court granted summary judgment to the employer because the plaintiff was a key employee and the employer had followed the requirements set out in the regulations:

> To deny restoration to a key employee, an employer must determine that restoring the employee to employment will cause substantial and grievous economic injury to the operations of the employer . . . . The regulations do not provide a precise test for the level of hardship or injury to the employer which must be sustained to constitute a substantial and grievous injury. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.
>
> Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence that it would have suffered substantial and grievous economic injury had it reinstated plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott to keep the facilities clean and Columbia Sussex's customers happy. In consideration of this reliance, plaintiff was the third highest paid employee at the facility. When plaintiff left, the facility was suffering, and an educated business decision was made to replace plaintiff . . . Defendant had also determined that reinstating plaintiff would cause it substantial and grievous economic injury if it had to pay two Executive Housekeepers $41,000 each.

10.4.1 FMLA Damages — Back Pay — No Claim of Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights not been violated.

You must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of lost wages to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

"[T]he accrual period for backpay [under the FMLA] is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2)." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 740 (2003). As the *Hibbs* Court noted, the statute of limitations for recovery under the FMLA is two years, but it is extended to three years if the employer's violation was willful. 26 U.S.C. § 2617(c)(2). The standard for "willfulness" is the same as that applied to the liquidated damages provision in the ADEA, and the statute of limitations provision in the Equal Pay Act, i.e., whether the employer "either knew or showed reckless disregard" for the employee's statutory rights. *See Hoffman v. Professional Med Team,* 394 F.3d 414, 417 (6th Cir. 2005) ("the standard for willfulness under the FMLA extended statute of limitations is whether the employer intentionally or recklessly violated the FMLA."). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 10.4.2 for an instruction covering a willful violation of the FMLA.

29 U.S.C.§ 2617(a)(1) provides the following damages for an employee against an employer who violates the FMLA:

> Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected (A) for damages equal to--
> (i) the amount of--
>> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
>> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
> (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii),

respectively[.]

Section 2617(a)(1)(B) authorizes the court to award "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of back pay damages as liquidated damages, unless the defendant persuades the court that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.2 FMLA Damages — Back Pay– Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights had not been violated.

[***[Alternative One: For use in cases where the plaintiff asserts back-pay claims based on more than one asserted FMLA violation, and some of those violations occurred earlier than two years prior to the commencement of the lawsuit:]*** In this case, [plaintiff] alleges that [defendant] willfully violated the Family and Medical Leave Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means for a violation to be "willful."]

[***[Alternative Two: For use in cases where all alleged FMLA violations occurred more than two years prior to the commencement of the suit:]*** In this case, [plaintiff] alleges that [defendant] willfully violated the Family and Medical Leave Act. You may only find for [plaintiff] in this case if [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act was willful. Let me now give you more information what it means for a violation to be "willful."]

You must find [defendant's] violation of the Family and Medical Leave Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [describe challenged action] was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

[***[For use with Alternative One:]*** If you find that [defendant's] violation of the Family and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Family and Medical Leave Act was not willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.]

[***[For use with Alternative Two:]*** If you find that [defendant's] violation of the Family and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Family and Medical Leave Act was not willful, then you must find for [defendant] in this case.]

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of lost wages to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

The Family and Medical Leave Act provides recovery for two years of lost wages and benefits if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation was willful. 26 U.S.C. § 2617(c)(2). The standard for "willfulness" is the same as that applied to the liquidated damages provision in the ADEA, and the statute of limitations provision in the Equal Pay Act, i.e., whether the employer "either knew or showed reckless disregard" for the employee's statutory rights. *See Hoffman v. Professional Med Team,* 394 F.3d 414, 417 (6th Cir. 2005) ("the standard for wilfulness under the FMLA extended statute of limitations is whether the employer intentionally or recklessly violated the FMLA.").

This instruction is to be used when the plaintiff presents evidence sufficient to create a jury question on whether the defendant willfully violated the FMLA. See Instruction 10.4.1 for the instruction to be used when there is insufficient evidence to create a jury question on willfulness but the plaintiff's claims are nonetheless timely.

29 U.S.C.§ 2617(a) provides the following damages for an employee against an employer who violates the FMLA:

> Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected (A) for damages equal to--
> (i) the amount of--
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
> (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively[.]

Section 2617(a)(1)(B) authorizes the court to award "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of back pay damages as liquidated damages, unless the defendant persuades the court that the violation was in

good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.3 FMLA Damages — Other Monetary Damages

Model

The Family and Medical Leave Act provides that if an employee is unable to prove that the employer's violation of the Act caused the employee to lose any wages, benefits or other compensation, then that employee may recover other monetary losses sustained as a direct result of the employer's violation of the Act.

So in this case, if you find that [defendant] has violated [plaintiff's] rights under the Act, and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other compensation as a result of this violation, then you must determine whether [plaintiff] has suffered any other monetary losses as a direct result of the violation. [Other monetary losses may include the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of proving these monetary losses by a preponderance of the evidence.

Under the law, [plaintiff's] recovery for these other monetary damages can be no higher than the amount that [he/she] would have made in wages or salary for a [twelve-week period][14] during her employment. So you must limit your award for these other monetary damages, if any, to that amount. You must also remember that if [plaintiff] has proved damages for lost wages, benefits or other compensation, then you must award those damages only and [plaintiff] may not recover any amount for any other monetary damages suffered as a result of [describe defendant's conduct].

Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any mental or emotional distress or pain and suffering that may have been caused by [defendant's] violation of the Act. So I instruct you that you are not to award the plaintiff any damages for emotional distress or pain and suffering.

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Family and Medical Leave Act provides that "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee [can be recovered by a plaintiff]." 29

[14] N.B.: In cases involving servicemember family leave under 29 U.S.C. § 2612(a)(3), the relevant period is 26 weeks rather than 12 weeks.

U.S.C. §2617(a). An award for these non-wage-related monetary losses is contingent upon the plaintiff's *not* obtaining an award for lost wages. This instruction therefore provides that the jury is to reach the question of monetary losses other than lost wages only if it finds that the plaintiff has not proven damages for lost wages.

The FMLA does not provide for recovery for emotional distress or pain and suffering. *Lloyd v. Wyoming Valley Health Care Sys*., 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning that "the statute itself by including 'actual monetary compensation' as a separate item of damage places a limited definition on 'other compensation'"; concluding that "the plain meaning of the statute is that 'other compensation' means things which arise as a quid pro quo in the employment arrangement, and not damages such as emotional distress which are traditionally an item of compensatory damages"). *See also Coleman v. Potomac Electric Power Co.,* 281 F. Supp.2d 250, 254 (D.D.C. 2003) :

> Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v. United Parcel Service, Inc*., 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of damages - punitive damages, nominal damages, or damages for emotional distress - are not recoverable. See *Settle v. S.W. Rodgers Co., Inc*., 998 F. Supp. 657, 665-66 (E.D. Va. 1998) (punitive damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000), aff'd, adopted 127 F. Supp. 2d 770 (M.D.N.C. 2000) (same).

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of any damages under the FMLA, as liquidated damages, unless the defendant persuades the court that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the

disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.4. FMLA Damages — Liquidated Damages

No Instruction

Comment

Punitive damages cannot be recovered under the FMLA. *Zawadowicz v. CVS Corp*., 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that nothing in the FMLA damages provision, 29 U.S.C. § 2617, authorizes an award of punitive damages)*; Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) (same). 29 U.S.C. § 2617 provides for a mandatory award of liquidated (double) damages for any award under the FMLA. No instruction is necessary on liquidated damages, however, because there is no issue for the jury to decide concerning the availability or amount of these damages. The court simply doubles the award of damages found by the jury.

It should be noted that 29 U.S.C. § 2617 provides that if the defendant proves that its conduct was in good faith and that it had reasonable grounds for believing that the act or omission was not a violation of the FMLA, the "court may, in the discretion of the court, reduce the amount of the liability to" the amount of damages found by the jury. No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for "the court." The jury has no authority to reduce an award of liquidated damages under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that any question of reducing liquidated damages is for the court). *Compare* Eighth Circuit Civil Instruction 5.86 (providing an instruction on the good faith defense to liquidated damages).

10.4.5 FMLA Damages — Nominal Damages

No Instruction

Comment

Nominal damages are not available under the FMLA. The court in *Walker v. UPS,* 240 F.3d 1268, 1278 (10th Cir. 2003) explained why nominal damages cannot be awarded under the FMLA, in contrast to Title VII, which authorizes an award of nominal damages:

> Because recovery [under the FMLA] is . . . unambiguously limited to actual monetary losses, courts have consistently refused to award FMLA recovery for such other claims as consequential damages (*Nero v. Industrial Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999)) and emotional distress damages (*Lloyd v. Wyoming Valley Health Care Sys., Inc*., 994 F. Supp. 288, 291-92 (M.D. Pa. 1998)). Thus *Cianci v. Pettibone Corp*., 152 F.3d 723, 728-29 (7th Cir. 1998) held that a plaintiff had no claim under the FMLA where the record showed that she suffered no diminution of income and incurred no costs as a result of an alleged FMLA violation.
>
> Invoking an attempted analogy to Title VII precedents, Walker argues that nominal damages should be allowed in FMLA cases because, just as under Title VII, nominal damages would allow plaintiffs whose rights are violated but who do not suffer any compensable damages to vindicate those rights. While it is true that recent cases have rejected the "no harm, no foul" argument in the Title VII context *(see, e.g., Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997)), that was not always so.
>
> Before the 1991 amendments to the Civil Rights Act, nominal damages (as well as damages for pain and suffering or punitive or consequential damages) were not available for Title VII violations, because the statute then provided for equitable and declaratory relief alone. Nominal damages became available only after 42 U.S.C. § 1981a ("Section 1981a," which governs damages recoverable in cases brought under Title VII) was amended to allow for compensatory damages in such actions (nominal damages are generally considered to be compensatory in nature).
>
> Walker's attempted argument by analogy fails because of the critical difference in statutory language between [29 U.S.C.] Section 2617(a)(1) and the amended Section 1981a. In contrast to the latter, . . . Section 2617(a)(1) does not provide for compensatory damages in general, but is instead expressly limited to lost compensation and other actual monetary losses. Because nominal damages are not included in the FMLA's list of recoverable damages, nor can any of the listed damages be reasonably construed to include nominal

> damages, Congress must not have intended nominal damages to be recoverable under the FMLA.
>
> We are obligated to honor that intent and therefore to countenance the award of only those elements of damages that Congress has deemed appropriate to redress violations of the FMLA. Because Walker has admittedly suffered no actual monetary losses as a result of UPS' asserted violation of the FMLA and has no claim for equitable relief, she has no grounds for relief under that statute.

See also Lapham v. Vanguard Cellular Systems, Inc., 102 F. Supp.2d 266, 269 (M.D.Pa. 2000) (while plaintiff had a cause of action for interference, she suffered no wage or other monetary loss, therefore "she cannot obtain relief under the FMLA and her claim must be dismissed."); *Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) ("It is clear that nominal damages are not available under the FMLA because the statutory language of the FMLA specifically limits recovery to actual monetary losses.").